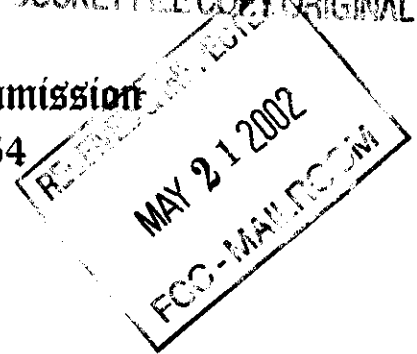


Before the  
**Federal Communications Commission**  
Washington, D.C. 20554

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In the Matter of )

FAMILY BROADCASTING, INC. )

EB Docket No. 01-39

Order to Show Cause Why the Licenses for )  
Stations WSTX(AM) and WSTX-FM, )  
Christiansted, U.S. Virgin Islands, )  
Should Not Be Revoked )

TO: Full Commission )

**APPEAL FROM REFUSAL OF PRESIDING OFFICER TO DISQUALIFY HIMSELF**

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### **SUMMARY**

By extraneous and highly prejudicial remarks made in his original Summary Decision in this case, coupled with still more prejudicial remarks made at a prehearing conference in April of 2002, and additional prejudicial comments made in his order refusing recusal, the ALJ in this proceeding has made it clear that he has a strong personal bias against the applicant, Family Broadcasting, Inc. In particular, he has made it clear that, because the Commission did not affirm his original Summary Decision he feels that he has "lost" this case and does not intend to make that mistake again. Furthermore, although the issues in this proceeding call for a determination as to whether Barbara James-Petersen was complicit in the wrongdoing which took place, the ALJ has made it quite clear that he has already decided she was and that she is not a credible witness. Family Broadcasting, Inc., cannot get a fair trial from this ALJ.

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**APPEAL FROM REFUSAL OF PRESIDING OFFICER TO DISQUALIFY HIMSELF**

Pursuant to Section 1.301(a)(3) and Section 1.301(c) of the Commission's Rules and Regulations, 47 C.F.R. Sections 1.301(a)(3) and 1.301(c), Family Broadcasting, Inc. ("Family"), by its attorney, hereby respectfully appeals from the Memorandum Opinion and Order, FCC 02M-37, released in this proceeding on May 16, 2002, by the presiding officer, ALJ Richard L. Sippel, as follows:

**I. Preliminary Statement:**

1. In the 47 years that the undersigned has been practicing law, the undersigned has never sought the disqualification of a presiding officer, either at the FCC or in any court. However, in this case, the presiding officer has shown a strong bias in favor of the prosecution and against the defendant, Family. That bias was shown in his original summary decision revoking the licenses of Stations WSTX AM and FM. It is further demonstrated by the unseemly haste with which the ALJ

issued his decision refusing to disqualify himself.<sup>1</sup> The bias was demonstrated again and shockingly so at a prehearing conference held on April 23, 2002. It surfaced for a fourth time in his actual decision denying Family's request that he recuse himself.

2. The rules limit an appeal to five typewritten pages. In this case, it is utterly, totally, and completely impossible to file a proper appeal that is restricted to five pages. First of all, the case is complex. Second, and even more important, the instances of bias are so numerous that they cannot be properly described in a five page pleading. Therefore, Family is filing a separate motion for waiver of the page limit. Such motions are frequently granted by the Court of Appeals in complicated cases. The Commission owes it to itself to grant such a waiver here, so that it may properly consider all of the facts and circumstances and reach a decision in the public interest.

## **II. Bias in the Summary Decision:**

3. This proceeding involves an Order to Show Cause why the licenses of Station WSTX AM and FM, Christiansted, U.S. Virgin Islands, should not be revoked. To date, a hearing has not yet been held in this proceeding. However, on May 10, 2001, a deposition was taken of Barbara James-Petersen. The ALJ attended the deposition, but asked no questions. Following the deposition, cross motions for summary decision were filed by Family and the Enforcement Bureau.

4. Prior to the deposition, an application was filed for Commission consent to the transfer of control of all of the stock held by Gerard Luz A. James and Asta K. James in Family to their children, Barbara James-Petersen, Gerard Luz A. James, II, Emmeth C. James, and Kelsey G. James. The ALJ had no jurisdiction over the transfer application. Nevertheless, in a Summary Decision,

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<sup>1</sup>The Motion to Disqualify Presiding Officer was filed May 6; the ALJ considered it for only eight days before adopting his order on May 14. Evidently, he did little soul searching.

released on August 7, 2001, the ALJ made the following comments:

“[S]ubstantial evidence shows that under Luz James’ control, which included a period of time when Ms. James-Petersen was station manager, there were willful violations that justify the remedy of revocation. Her past performance does not instill a confidence that she can bring the stations into full compliance in the future. Family has failed in its proof to show by reliable evidence that the proposed familial assignees would guarantee future compliance. Luz James, and all others associated with the operations of the Family stations, including Barbara James-Petersen and Asta James, knew from the designated renewal proceeding in 1997, and the subsequent Notices of Violations incident to on-site inspections, that there was a probability of revocation if corrective action was not taken, particularly if Family was less than candid in its dealings with the Commission. Family ignored the warnings and chose to violate the law. Why should the future be any different? There are presented no reasonable probabilities of future compliance that can alter the historical merits of this case.” (Summary Decision at para. 42.)

5. Now, these remarks, purporting to tie Barbara James-Petersen to the 1997 renewal proceeding, were completely unsupported by any record evidence. As we will show, Barbara James-Petersen was not present at the radio station in 1997 and had nothing to do with the renewal proceeding. Moreover, the renewal proceeding had absolutely nothing to do with any of the violations which resulted in the present proceeding. The two matters were completely unrelated.

6. In the late 1980's and early 1990's, the Commission began having a problem with silent radio stations. Most of the stations which were silent were AM stations but some were also FM stations. The Commission felt that it had a public interest obligation to get as many radio stations back on the air as possible. Consequently, where a station remained silent for a long period of time, it began designating renewal applications for hearing. A description of the policy is set forth in Birach Broadcasting Corporation, 16 FCC Rcd 5015 (2001) at paragraphs 10-13. A search in Westlaw discloses at least 25 of these renewal cases (some of which were handled by ALJ Sippel, himself), where licenses of silent stations were designated for hearing. In most cases, the hearing

proceedings succeeded in getting the attention of the licensees, who put the stations back on the air. For examples, see Quality Broadcasting, Inc., 12 FCC Rcd 2893 (ALJ 1997); Chester Broadcasting Company, Inc., 12 FCC Rcd 2333 (ALJ 1997); Bluestone Broadcasters, Inc., 11 FCC Rcd 17833 (ALJ Sippel 1996); Hometown Media, Inc., 11 FCC Rcd 19677 (1996); L.T. and Raymond Simes, 11 FCC Rcd 12248 (MMB 1996); WKZF-FM, Inc., 11 FCC Rcd 11793 (ALJ 1996); WPVG, Inc., 11 FCC Rcd 14348 (MMB 1996); Southwestern Broadcasting Corporation, 11 FCC Rcd 9120 (ALJ Sippel 1996); Communications Enterprises, Inc., 11 FCC Rcd 8555 (ALJ Sippel 1996); Jotocon Communications, Inc., 11 FCC Rcd 13814 (MMB 1996); University of Kansas, 11 FCC Rcd 13818 (MMB 1996); Clarence E. Jones, 11 FCC Rcd 12086 (MMB 1996).<sup>2</sup>

7. On May 30, 1996, the Audio Services Division released a Hearing Designation Order in the matter of Family Broadcasting, Inc., published at 11 FCC Rcd 6647. In that order, the Audio Services Division indicated that it had information that Station WSTX-FM had discontinued operations on October 15, 1994, and had not resumed operations. Therefore, the Audio Services Division designated the application for renewal of the WSTX-FM license for hearing on the following issues:

- (1) To determine whether Family Broadcasting, Inc. has the capability and intent to expeditiously resume the broadcast operations of WSTX(FM), consistent with the Commission's Rules.
- (2) To determine whether Family Broadcasting, Inc. has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules.
- (3) To determine, in light of the evidence adduced pursuant to the preceding issues,

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<sup>2</sup>Eventually, the Congress passed legislation, 47 U.S.C. 312(g), providing for automatic forfeiture of a station license if the station remained silent for more than a year. Thereafter, the FCC discontinued the practice of designating renewals for hearing where a station was silent, because there was no longer a need to do so.

whether grant of the subject renewal of license application would serve the public interest, convenience and necessity.

Please note that the only rule violations alleged in the Hearing Designation Order related to Sections 73.1740 and/or 73.1750 of the Commission's Rules, which pertain entirely to the need to be on the air or, if the station is not on the air, to have permission to remain silent. These were the same issues which were always designated in "silent station" cases, as boilerplate.

8. Eventually, a hearing was held and Luz James entered an appearance on behalf of Family. Apparently he also filed a Motion for Summary Decision, indicating that the FM station was back on the air (although he failed to report as he should have done that the station was not operating from its proper transmitter site). On June 18, 1997, ALJ Luton granted the Motion for Summary Decision and renewed the FM license, pointing out that the only issue to be decided was whether the station was back on the air, which it was. Family Broadcasting, Inc., 12 FCC Rcd 18700 (Summary Decision 1997).

9. While all of this was going on, Barbara James-Petersen was not employed at the radio stations. She was working for the state, i.e., Virgin Islands legislature (Dep. Tr. pp. 6-7, 88-89). She did not return to the radio stations until July 1, 1998. She knew only that her father went to Washington for a hearing of some kind (Dep. Tr. 88). Even if she had been intimately acquainted with the renewal proceeding, however, there was nothing in that proceeding which would in any way have alerted her to any violations other than the violation of the rules requiring that the FM station be on the air or have permission to be silent. Thus, to the extent that the ALJ's decision indicated to the contrary, he was simply wrong. He based his remarks on a preconception that was utterly unsupported by any evidence.



### **III. Bias Demonstrated at Prehearing Conference:**

10. Later, when this case was remanded for further hearing, a prehearing conference took place on April 23, 2002. Counsel had hoped that following the remand order the ALJ would rethink some of his preconceptions and approach this case with an open mind. However, remarks made by the ALJ at the prehearing conference held on April 23, 2002, suggest otherwise.

11. At the very beginning of the prehearing conference, the ALJ questioned whether testimony from Barbara James-Petersen could resolve the issues in this case. He remarked that:

“THE COURT: Let me finish what I am saying. Certainly, Ms. James Peterson could come in, and she could testify as to all the issues. And you would have testimony as to all the issues but I am not so sure that that would carry the day, necessarily. I am not trying to prejudge you on that but –”. Tr. 7, lines 3-8.

12. At page 21, the following, extremely significant, colloquy took place between the Enforcement Bureau and the ALJ:

“MR. SHOOK: Your Honor, may I suggest something? Ordinarily, when we have misrepresentation issues to deal with in the hearing designation order, or charging document, if you will, there is usually at least one, if not more than one statement pointed out. I don't remember reading through this whether there were any particular statements noted as having come from, or having been subscribed to by Ms. James Peterson in some fashion.

If there are any statements in the Order -- and I have just forgotten what they may be, it would seem to me that that is something that -- well, I would like to think at first that it was capable of resolution by motion for summary decision. But it may not be, given that you would want to observe credibility.

THE COURT: Being as how I already tried that and lost any way, I think we are going to have a hearing on this.” Tr. 21, lines 6-22.

With all due respect, the ALJ did not “lose” the case. It was not the duty of the ALJ to either revoke the licenses of Stations WSTX AM and FM or to prevent a grant of the pending transfer application. His duty was to hear all of the evidence and reach a well reasoned and supportable decision one way

or the other. The ALJ's comment that he "lost" suggests that he thinks otherwise; that it is his duty to do the job right and write a decision revoking the licenses and denying the transfer that will stand up on appeal. That is not the role of a fair minded and impartial ALJ.

13. At page 25 of the transcript, the ALJ reverted to his view that the earlier renewal hearing is somehow related to the present proceeding. Relying on footnote 37 of the remand order (which in no way supported his observations), the ALJ remarked that he was the second judge in this case.

The following colloquy ensued:

"THE COURT: I am the second judge on this -- this is the second trial of the second judge in this case.

MR. COLBY: Well, that is not quite true Your Honor.

THE COURT: Oh, yes, it is.

MR. COLBY: No. The first --

THE COURT: Judge Luton had this case --

MR. COLBY: Judge Luton had only one issue before him. At that time, about ten years ago or whatever it was, the Commission designated a large number of license renewals for hearing because the stations were off the air. The only issue before Judge Luton, the single issue that he had before him was, was the station on the air or not?

By the time that the hearing came around, the station was back on the air, so that issue was automatically satisfied. There were no violations specified in the earlier hearing before Judge Luton, except the violation of the rule that requires a station to be on the air.

I noticed in Your Honor's decision, I think Your Honor made a mistake in that respect. You were under a misimpression because factually it is not true that there was any prior history of hearings involving violations. The only rule that was involved in that prior hearing was the rule that required you to be on the air." Tr. 26, lines 1-24.

With all due respect to the Commission and the ALJ, the earlier renewal hearing did not involve

anything more than being off the air. Therefore, the ALJ's description of himself as the second judge in this case is just another example of bias and prejudgment.

14. Later on, moreover, the ALJ made the following remarks that strongly suggest that he believes that Barbara James-Petersen was complicit in the wrongdoing that took place at the radio stations prior to the time when she became president of the company in March of 2001. He remarked that:

“THE COURT: Well, my point is that when you start back with that proceeding, in terms of actual or implied knowledge, and you work it through 1998, when she becomes the general manager and then this is all part of a family operation; and then you bring that forward to when she becomes president, after there is a designation order for a hearing, or after it has been brought to their attention that there is a problem with respect to Mr. Luz James' credibility, it starts to take on the proportion of a kind of a package deal here -

MR. COLBY: Is it your impression, Your Honor, that she was at the radio station prior to 1998? Because, if you are under that impression, you are incorrect.

THE COURT: Well, in 1998, she became the general manager.

MR. COLBY: That's right. In 1998, she became the general manager. Prior to that time, she was nowhere around.

THE COURT: Well, that does not mean that she did not have information. This is a family.<sup>3</sup> This is not some --

MR. COLBY: But she was not living in the Virgin Islands, if you recall.<sup>4</sup>

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<sup>3</sup>While the transcript does not indicate the nuances of the court's remarks, the audio tape will show that the ALJ emphasized the word “family”, reflecting the fact that he has made up his mind that Barbara James-Petersen, a grown woman, was somehow part of something akin to an organized crime family, all of whose members had set out to violate the Commission's Rules and cover up the violations with misrepresentations.

<sup>4</sup>In point of fact, counsel was in error. The record shows that just prior to becoming general manager she was working for the Virgin Islands legislature. There is, however, not one solitary shred of evidence that, in the capacity, she knew anything at all about the radio station and, in particular, the 1997 renewal hearing. At most, she knew that her father was coming to

THE COURT: All right.

MR. COLBY: Maybe this is something I need to address specifically. You may be under some misimpression as to the facts.

THE COURT: Well, look, I am not going to, obviously, get into a speculative endeavor here, nor would I get into a speculative endeavor with respect to the findings. I am only going to go with what is in the record. What I am saying is, is that we are sitting here today, in terms of trying to -- about how to get ready for a hearing, and I am trying to think of all the things of how I -- what is the big picture in this case? That is all I am thinking of is the big-picture look of this case.

It seems to me to just discard the proceeding before Judge Luton as being irrelevant. I don't think -- even the Commission writing this footnote did not see it that way. But the relevance of it would be -- the weight of it versus the relevance of it are two entirely different things." Tr. pps. 28, lines 1-25; 29, lines 1-16.

15. At page 22 of the transcript, the ALJ again mentioned the need to assess the credibility of Barbara James-Petersen. On the same page, he suggested that the Enforcement Bureau reinspect the stations.<sup>5</sup> At page 32, the ALJ asserted that there is now a financial issue in this case. That, of course, is untrue. If the FCC had chosen to designate a financial issue, it would have done so. It did not.

16. At page 33 of the transcript, the ALJ expresses sympathy for the limited resources available to the Enforcement Bureau, as follows:

"MR. SHOOK: The second aspect is: Whether or not Ms. James-Peterson is complicit in any of the wrongdoing that the Commission has already determined took place? That is something that we have explored, at least to some extent, previously in the deposition of Ms. James-Peterson; and I anticipate would explore further through the document request that we already have -- perhaps, some interrogatories,

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Washington for some sort of hearing.

<sup>5</sup>Family would have no objection to a reinspection. Since both stations are operating legally under STA's, a reinspection would not disclose any significant violations. The ALJ, however, has no business urging a reinspection. That decision should have been left to the Enforcement Bureau.

perhaps a station inspection.

I cannot say right now whether there will be depositions simply because I do not know whether or not the Bureau budget will allow for it. We may just have to live with what we can come up with by a document request, interrogatories and a station inspection.

THE COURT: Wow, the budget is that tight?

MR. SHOOK: Your Honor, we had to pull teeth to get money for Peninsula. If we have to pull teeth to get money for a case where we have the burden of proof, I can only image how much more difficult it will be when we do not have any burdens.

THE COURT: Well, that --

MR. SHOOK: I am not immediately involved in that problem, but I mean to say that, if a case is -- if you have a critical witness, and the critical witness is going to define which way the case goes and you don't have that witness, you don't have full and complete discovery of that witness whatever it takes, that is a tough way to work -- to walk into court. You are taking a chance --

MR. SHOOK: Your Honor, this isn't going to be the first hearing where we walk in with one hand tied behind our backs.

THE COURT: Well, that is -- I can only just say that that is very unfortunate because, to the extent that there is a lot of public interest in these issues, that is the bottom line . . ." Tr. 33, lines 2-25; r. 34, lines 1-10.

17. The ALJ seems not to realize that Family has even more limited resources. It is trying to run a radio station in a desperately poor U.S. possession. It has no team of lawyers, investigators, inspectors and accountants. It has a single practitioner representing it, assisted on a limited basis by another single practitioner. Yet, the ALJ expressed no sympathy for Family; his concern was for the allegedly limited resources of the U.S. Government. Again, the ALJ's remarks display a partiality to the prosecution.

18. At page 42 of the transcript, the ALJ seems to be urging the Enforcement Bureau to move to add an additional issue against Family. He says:

“THE COURT: Well, I do not know if that will be the answer. But whatever you do, you do. I am taking this hearing designation order very seriously in the context in which it was given. They seem to be -- the Commission seems to be not inviting new issues, but be going overboard to be sure that all possible issues are raised in this case, and are fully litigated.

Now, it is going to reach a point, of course, when that is going to be -- you are -- everybody is subject to the rule of unreasonable delay in terms of doing this. But, again, that would be one of the things that I would expect the Bureau to do, to take a hard look at what the Commission is saying. To take a hard look. Maybe you already have and to come forward, within a reasonable period of time, with a petition for new issues if that is the case. This may be -- I mean aside from the one that you have flagged. I see the one that you flagged.” Tr. 42, lines 11-25; Tr. 43, lines 1-2.

#### **IV. Bias Evidenced in ALJ's Decision Refusing to Recuse Himself:**

19. The ALJ's decision refusing to recuse himself contains additional evidence of bias, as does his record. For example, at page 2 of his MO&O, the ALJ listed all of the ten issues specified against Family in this proceeding. Now, these issues are, indeed, numerous. However, Family is absolutely convinced that it can satisfy each and every issue. Indeed, documents have already been submitted and testimony given which satisfies many of the issues. The only purpose that could have been served by reciting all of the issues is to demonstrate that the issues are numerous and, therefore, serious, and that the ALJ does not expect Family to satisfy the issues.

20. At paragraph 4 of the MO&O, the ALJ indicates that the Commission “suggested” that the Mass Media Bureau “avail itself of the opportunity to have the Enforcement Bureau formally request that the ALJ add any further issues deemed appropriate by its processing staff.” That is true. It was not the proper role of the ALJ, however, to remind the Enforcement Bureau of that suggestion. The Enforcement Bureau was perfectly competent to make their own judgments as to whether additional issues were needed, and has, in fact, filed such a motion.

21. At paragraphs 8 and 9 of the MO&O, the ALJ returns to a theme that indicates that he

still thinks that Barbara James-Petersen had something to do with the 1997 renewal hearing. This is simply outrageous. The ALJ attended the deposition of Ms. James-Petersen. He knows very well that Ms. James-Petersen was nowhere near the radio stations in 1997 at the time of the renewal hearing. She was working for the legislature. He also indicates that Barbara James-Petersen was “the station’s general manager from 1998, and therefore was in a position to know the condition of the station in the 1997-98 time period”. Once again, he has this notion firmly embedded in his consciousness despite the fact that the evidence clearly shows that Barbara James-Petersen had absolutely nothing to do with the radio station until July 1, 1998. The years 1997 and 1998 are two separate years; by lumping them together as if they were one, the ALJ simply confirms his bias.

22. Early on in this proceeding, Family’s counsel made a search in Westlaw of ALJ Sippel’s cases. Counsel was unable to find a single case in which ALJ Sippel ever ruled against the government. The same search discloses, however, that over a seven year period from 1990-1997, at least three motions were filed, seeking the disqualification of ALJ Sippel on the grounds of bias. WWOR-TV, Inc., 5 FCC Rcd 2845 (1990); Center for Study and Application of Black Economic Development, 7 FCC Rcd 3101 (1992); James A. Kay, Jr., 12 FCC Rcd 15662 (1997). That is a large number, considering that many judges have long careers and are never asked to disqualify themselves.

#### **V. Conclusion:**

23. ALJ Sippel has made up his mind that it is his duty to revoke the licenses of Stations WSTX AM and FM. He regards the remand order as a personal defeat, as evidenced by his statement that he “lost” when he tried to proceed by summary decision. Family is entitled to a trial by a fair and impartial judge. Therefore, Family respectfully requests that the Commission appoint

another and different ALJ to handle the remand proceeding.

Respectfully submitted,

May 20, 2002

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Its Attorney



CERTIFICATE OF SERVICE

I, Traci Maust, a secretary in the law office of Lauren A. Colby, do hereby certify that copies of the foregoing have been sent via facsimile and Federal Express, this 20<sup>th</sup> day of May, 2002, to the offices of the following:

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